No. 92-344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMNESTY INTERNATIONAL AND AMNESTY INTERNATIONAL — USA IN SUPPORT OF RESPONDENTS

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BRIEF FOR *AMICI CURIAE* AMNESTY INTERNATIONAL and AMNESTY INTERNATIONAL -- USA IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

This brief is submitted *amicus curiae* by Amnesty International ("AI") and Amnesty International-USA ("AIUSA"), with the consent of the parties.

AIUSA is one of the 44 national sections of AI, an independent worldwide movement which works impartially to seek the release of "prisoners of conscience," defined as men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language, or religious creed, provided they have not used or advocated the use of violence. AI also works for fair and prompt trials for all political prisoners, and opposes torture or other cruel, inhuman or degrading treatment or punishment.

AI was founded in London in 1961 and now has more than 1,000,000 individual members, subscribers, and supporters

in 150 countries. There are more than 4,200 AI groups in more than 70 countries, working in support of all aspects of AI's mandate. Since AI was founded, AI groups have intervened on behalf of over 25,000 prisoners in more than 100 countries.

Basing its mandate on the Universal Declaration of Human Rights, GA Res. 217A, U.N. Doc. A/810 (1948), and other international standards for the protection of human rights, AI operates independently of any government, political grouping, ideology, economic interest or religious creed and does not therefore support or oppose the views of any person whose rights it seeks to protect. Nor does AI grade governments according to their record on human rights. Rather than attempting such comparisons, AI concentrates on trying to end specific human rights abuses within its mandate and advocates that all governments comply with international standards to protect human rights. For its work, AI received the Nobel Peace Prize in 1977.

On the basis of missions, interviews and a worldwide network of correspondents, AI's International Secretariat in London collects information and issues reports on human rights conditions throughout the world. AI has also issued reports with respect to refugee protection -- including procedures for the determination of refugee status -- in a number of countries, including the United States. This information is disseminated to governments and the public in reports, interventions, and various other materials.[1]

AI's concern for refugees and asylum-seekers arises from its work for the protection of human rights, which includes opposition to the forcible return of any person to a country where he or she may reasonably be expected to be imprisoned as a prisoner of conscience, or to be subjected to

[1] AI has formal consultative status or similar formal relations with the United Nations ("U.N."), UNESCO, the Organization of American States, the Council of Europe, and the Organization of African Unity.

torture, "disappearance", or execution. AI therefore seeks to ensure that governments observe the principle of *non-refoulement* -- expressed in the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), as incorporated by the U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 ("Protocol")[2] -- and that all refugees have access to a fair and adequate refugee determination procedure. Accordingly, AI participated in the legislative process which led to the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. (1980) (the "Refugee Act" which amended §243(h) of the Immigration and Naturalization Act of 1952 or "I.N.A.", 8 U.S.C. § 1253(h)(1)), and regularly provides information about country conditions and international legal standards to courts, administrative agencies, and decision-makers at all levels of the refugee process, including through the submission of *amicus curiae* briefs to the courts of the United States. *See, e.g., INS v. Stevic*, 467 U.S. 407 (1984); *Jean v. Nelson*, 472 U.S. 846 (1985).[3]

[2] Although the United States is not a signatory to the Convention, since 1968 it has been a party to the Protocol, which incorporates Articles 2 through 34 of the Convention. The United States thereby agreed to be bound by those Articles of the Convention, including Article 33. Accordingly, for the purposes of this brief, references to the Protocol and U.S. obligations under it will include the Convention and its provisions. Unless otherwise specified, references to "Articles" will be to Articles in the Convention, as incorporated by the Protocol.

[3] Although AI is often unable to express an opinion about the validity of a particular applicant's fear of persecution, the Immigration and Naturalization Service ("INS") and the courts have relied upon AI's expertise in assessing the human rights situation in various nations around the world for the purpose of evaluating an individual's request for asylum in this country. See, e.g., *Fernandez-Roque v. Smith*, 539 F. Supp. 925 (N.D. Ga. 1982);

AI is specifically interested in this case because the Executive Order deprives Haitian asylum seekers who are interdicted at sea of any possibility of exercising their right to seek asylum and to protection against *non-refoulement*. As such, it is an egregious violation of international law that both places Haitians at risk of human rights violations upon return, and directly undermines the international regime for the protection of refugees. AI strongly holds the position that under international standards refugees are entitled to a hearing on the merits of their *non-refoulement* claims by the established authority through a fair and adequate procedure. It is AI's view that a dangerous precedent would be set if the executive branch of government were allowed to deny refugees a hearing on the merits of their *non-refoulement* claims.

Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977). The United States Congress has also recognized the integrity of AI's human rights information. See, e.g., International Financial Institutions Act of 1977, 22 U.S.C. § 262g.

SUMMARY OF ARGUMENT

AI and AIUSA respectfully urge this Court to affirm the Second Circuit's decision[4] to grant injunctive relief. As the District Court acknowledged in its original order denying the requested injunction a denial of relief leaves the United States free to "return Haitian refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so."[5] While the District Court correctly concluded that at least some of the repatriated Haitian refugees face serious human rights violations, it erred in holding that the rule barring the return of refugees to territories where they would face such violations may not be invoked before the courts of the United States.[6] The Court of Appeals correctly held that the applicable law in this country prohibits the government "from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion."[7]

The principle of non-return or *non-refoulement* is a fundamental pillar of the international legal regime governing the status of refugees. As a rule enshrined in treaties and general customary international law, it is part of the law of the

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[4] The opinion of the Court of Appeals is reported as *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992).

[5] Memorandum and order of June 5, 1992 at p. 7.

[6] That rule is set out in Article 33 of the U.N. Convention Relating to the Status of Refugees, and is incorporated by reference into Article 2 of the U.N. Protocol Relating to the Status of Refugees. The United States is a party to this Protocol.

[7] *McNary*, 969 F.2d at 1367-1368.

United States. Furthermore, the U.S. Congress has directly incorporated this principle into § 243(h)(1) of the I.N.A., 8 U.S.C. § 1253(h)(1). Thus U.S. law clearly requires that any person who claims to be seeking refuge from persecution be afforded a hearing on those claims before being subjected to involuntary repatriation.

Contrary to arguments which have been advanced by the Petitioner,[8] the fact that there is a massive Haitian refugee crisis is no justification for denying individuals the required hearings. Refugee flows generally result from "crisis" conditions. The very purpose of the U.N. Convention and the U.N. Protocol is to affirm binding international standards for dealing with refugee flows resulting from such crises.[9] Past practices of the U.S. Government and statements by U.S. Government officials support this conclusion. Furthermore, the U.S. policy of interdiction is over broad and contrary to the international legal obligations of this country because it interferes with the right of individual Haitians to seek asylum abroad, a right which is recognized by customary international law.

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[8] See, Defendant's Memorandum in Opposition to the Entry of Injunctive Relief Respecting the New Executive Order, filed with the District Court below on May 29, 1992, at 1-6.

[9] The intergovernmental Executive Committee of the UNHCR, in which a United States government representative participates, has affirmed with regard to cases of large scale influx of refugees, "In all cases the fundamental principle of non-refoulement--including non-rejection at the frontier--must be scrupulously observed." Executive Committee Conclusion No. 22(XXXII), Protection of Asylum Seekers in Situations of Large-Scale Influx, 32nd Session (1981), § II(2).

ARGUMENT

A. CONDITIONS IN HAITI TODAY ARE SUCH THAT REPATRIATED HAITIAN REFUGEES FACE A VERY REAL THREAT TO THEIR LIVES AND FREEDOM AND HAVE LITTLE EFFECTIVE OPPORTUNITY TO APPLY FOR ASYLUM IN THE UNITED STATES THROUGH DIPLOMATIC/CONSULAR CHANNELS

1. Human Rights Conditions in Haiti

Amnesty International's January 1992 report, *Haiti: The Human Rights Tragedy - Human Rights Violations Since the Coup* (AI Index AMR 36/03/92)[10] documented widespread human rights violations in Haiti. The Haitian *de facto* authorities have violated the rights of individuals and groups from broad sectors of the population which the authorities perceive have opposed their rule since the coup d'etat on September 30, 1991. These abuses included large numbers of arbitrary arrests, ill-treatment and torture, resulting in severe injuries and death in some cases, as well as disappearances, extra-judicial executions and killings by the security forces and armed civilians working with them.

In a research mission to Haiti from March 20 through April 3, 1992, and in the course of ongoing research contacts with Haiti since then, Amnesty International has continued to receive extensive detailed reports which indicate that the human rights crisis in Haiti remains extremely serious as the security forces and their collaborators arrest, intimidate, ill-treat and torture perceived opponents. The Findings of AI's mission to Haiti are set out in "Human Rights Held to Ransom" published in August 1992 (AI Index AMR 36/41/92),

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[10] This report is in the record as Plaintiff's Exhibit #30.

which also contains an update of the human rights situation through July 1992.

The crisis has worsened in several respects:

1) The condition of people in hiding has deteriorated:

a) The weeks and months during which many thousands of people who were forced into hiding, fearing for their lives, have taken a great toll on the victims. Many of them have been forced to flee from one place of hiding to another.

b) Many have suffered ill-treatment or torture and have been unable to obtain necessary medical care for fear of discovery and persecution by the security forces. They also have great difficulty obtaining food and other supplies as they know that the authorities will arrest them if they are caught obtaining supplies. Anyone bringing them supplies or providing shelter runs considerable risk of arrest, ill-treatment, or torture as well.

c) When those in hiding are forced to return to their families, their homes, or their communities, due to exhaustion, medical necessity, intense hunger, or the net effect of long-term trauma, they are often threatened with death, beaten, arrested, insulted, humiliated, and forced into hiding again.

2) The situation of those not in hiding has worsened:

a) Living with the constant fear of what the security forces will do next and the fear of what will happen to a relative or colleague if taken into custody has left many people traumatized. So broad is the network of government informants and so prevalent the climate of terror throughout much of Haiti that many people known to have worked for social change through popular organizations and groups are extremely restricted in their activities.

b) The security forces and their collaborators have continued to increase their ability to terrorize sections of the population. This campaign is facilitated by deployment of large numbers of armed civilian informants throughout the country who report on the activities of anyone supporting the

democracy movement in Haiti and the government of Jean-Bertrand Aristide.

The authorities frequently resort to the practice of arbitrary, short term arrest with severe beatings and the deployment without warning of heavily-armed uniformed military personnel who shoot into the air during the night or enter a neighborhood without warning in large numbers, carry out searches, burn homes or confiscate property, and arrest and beat people who are present, warning them that they may be killed at a subsequent encounter. Even family members of people perceived to be opponents have been abducted, threatened, insulted, or otherwise terrorized and humiliated.

Reports of shootings by the security forces, heavily armed individuals, or groups in civilian clothes continue with alarming frequency. In some cases the bodies are left on the street; in others, the families have difficulty in obtaining access to the bodies.

c) Family members of those in hiding also suffer, since persons in hiding have no access to their traditional livelihood and thus cannot support their families. Fields have been left untended and children have gone hungry.

d) The authorities continue to suppress information or materials critical of the *de facto* government or in favor of the government of deposed President Jean Bertrand Aristide. Military personnel search travellers for posters, photographs, t-shirts, newspapers, or letters and have arrested or severely beaten people found to be in possession of these or similar articles. The military has also broken up meetings of high school students, worshippers, and even people simply found listening to a radio station such as Voice of America or a clandestine broadcast of news relating to Haiti's democracy movement.

Civilian informants attempt to monitor all activities in and around places where popular organizations meet or where people congregate in numbers. This has resulted in the arrest or ill-treatment of priests and of individuals attending religious meeting where the authorities considered the priest to be a political opponent. In many documented cases, the only way

to avoid arrest, ill-treatment or harassment has been through bribing local authorities.

These conditions explain why so many Haitians have fled their country seeking escape from persecution and suggest the need for careful investigation of claims for asylum in the context of this crisis.

2. The Impact of the Current Human Rights Crisis on Human Rights Monitoring and the Asylum Process

Because many Haitians working for social change have been displaced and cut off from their constituencies, while, on the other hand, numerous civilian informants have been deployed, many supporters of the elected government of President Aristide do not know whom they can trust. Accordingly, many people will disguise their political sympathies or withhold information about abuses they may have suffered.

Similarly, it is very dangerous for Haitian human rights monitors to gather information about human rights abuses. They are afraid that their efforts will be monitored by the authorities and may lead the authorities to discover where possible victims are hiding. Reprisals by the military and their collaborators do not necessarily take place in a consistent or predictable manner. For many, the threat of arrest is a constant in their daily lives.

Amnesty International has received many consistent reports of people being informed their name has appeared on a list of people who are to be arrested. Often the members of the security forces who are familiar with the lists are said to have been transferred to another part of the country. Accordingly, people who have fled to a different area report that they have difficulty finding anywhere to hide where there is not the risk that a member of the military or an informant will eventually discover them. In some cases the authorities

have taken advantage of the presence of human rights monitors or foreign visitors to the region to collect information, and accordingly many of those who have the most to fear from the authorities will be very reluctant to meet with foreign delegations or any people they do not fully know and trust. Similarly, human rights monitors are reluctant to meet with people in hiding for fear of leading the authorities to the people they are pursuing or giving the authorities further pretext for accusations that given individuals who have contact with foreigners are "troublemakers".

In some cases, documentation of human rights violations has become more difficult not only because of the danger to those who collect or communicate information, but also due to the broad sense of frustration and despair on the part of Haitians who have been victims of or witnesses to human rights violations. To them, the nature of the persecution in Haiti and the level of human rights violations are of such common knowledge that they cannot understand that someone may not be aware of these events. They are shocked when investigators, monitors and others question their accounts. They often do not understand why someone would need to document what is to them perfectly obvious.

Many of these individuals say they do not feel they can trust people with information which might cost them their lives. The fact that thousands of Haitians are being turned over by US government officials to Haitian police, and that thousands of Haitians are being intercepted by the US Coast Guard and returned to Haiti without any kind of interview, indicates to many Haitians that the Haitian military and the US government are working together and that supporting democracy in Haiti is seen as criminal activity. Many of them say they are convinced that they would be arrested if they attempted to reach an embassy or to make contact with an international organization, and their fears have been borne out by events. In one case, an Amnesty International contact was arrested in the Central Plateau and accused of securing the release of prisoners through contacting AI.

In recent weeks, Amnesty International has received numerous reports that those interdicted on the high seas and returned to Haiti by the US authorities have been arrested, apparently to identify the organizers of the boat trips, held for several hours and then released. Those accused of being the organizers are normally held for several days but, as far as Amnesty International is aware, they have never been subjected to legal proceedings or charged with a recognizable criminal offense under Haitian law.

AI fears that these short-term arrests may be carried out to intimidate those who are exercising their right to leave their country and seek asylum. As recently as November 30, 1992, 14 people were arrested upon arrival in Port-au-Prince after having been intercepted by US Coast Guard ships and forcibly returned to Haiti. According to the information available to AI, the group had apparently been unwilling to leave the Coast Guard ship, but they were subsequently handed over to the Haitian authorities by US Coast Guard officers and immediately arrested and accused of having organized the boat trips. They remained in detention for several days and, as far as AI is aware, were released uncharged.

3. The Opportunity For Asylum With United States Authorities in Haiti is Illusory For Most Haitians Threatened With Persecution and Does Not Affect the Protections Due Haitians Intercepted By U.S. Authorities Outside Haiti

The Government has argued that those repatriated can avail themselves of the opportunity to apply for asylum at the Embassy of the United States in Haiti. Due to surveillance, intimidation and other factors, this opportunity may only be illusory for those most in need of political asylum. For a Haitian asylum seeker who is a victim of political persecution in his own country, and who is in hiding from the military or

the police, any attempt to apply for refugee status with U.S. authorities in Haiti would expose him to a substantially increased risk of political persecution.

In any case, even the ready and effective availability of an alternative channel for seeking asylum could not excuse the violation of the principle of *non-refoulement*, which prohibits the return of a refugee "*in any manner whatsoever* to ... territories *where his life or freedom would be threatened*" for political reasons.[11] To assert otherwise is to challenge a fundamental aspect of the internationally recognized right to asylum.

B. THE INTERNATIONAL LEGAL NORM OF NON-REFOULMENT IS APPLICABLE TO THIS CASE

1. The UN Protocol Relating to the Status of Refugees, a Treaty Which Prohibits the Return of Refugees to Territories Where They Face Persecution, is Directly Applicable to This Case

As a party to the United Nations Protocol Relating to the Status of Refugees,[12] the United States is bound by the obligation of *non-refoulement* set out in Article 33(1) of the

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[11] Article 33(1) of the Convention (emphasis added).

[12] U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

United Nations Convention Relating to the Status of Refugees[13] which states, in pertinent part, that:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

The Protocol is a "Treat[y] made ... under the Authority of the United States," the provisions of which are the "supreme law of the land." U.S. Const., Art. VI § 2. Like all treaties, the Protocol therefore qualifies in some measure the sovereignty of the United States. *See The F.S. Wimbledon* 1923 P.C.I.J., (ser. A), No. 1, 24, 25. The United States treaty obligations under the Convention require the government to comply with the *non-refoulement* requirement of Article 33(1). *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The *non-refoulement* requirement of Article 33(1) must be given effect by the courts because it is self-executing. *Cardoza-Fonseca*, 480 U.S. at 429 ("Article 33(1) imposes a *mandatory duty on contracting States*") (emphasis added); *see also Coriolan*, 559 F.2d at 996-997; *Nicosia v. Wall*, 442 F.2d 1005, 1006 n. 4 (5th Cir. 1971).

The Government has argued, based on its interpretation of the negotiating history of the Refugee Convention, that Article 33 does not impose any obligations in cases of mass migrations across frontiers or of attempted mass migrations.[14] As the Court of Appeals noted in the opinion below,[15] the Treaty's negotiating history is quite

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[13] U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[14] Brief for the Petitioners, pp. 42-43.

[15] *McNary*, 969 F.2d 1350, 1365-1366.

ambiguous. In contrast, the language of Article 33(1) is clear and unambiguous in proscribing the "return ... of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."

The force of such language is further reinforced by reference to the Vienna Convention on the Law of Treaties, which sets out rules for the interpretation of treaties are widely considered to codify international law.[16] The basic rule in the Vienna Convention is that treaties must be interpreted in accordance with the ordinary meaning of their terms.[17] Recourse may be had to the negotiating history of a treaty to determine a different meaning only when the ordinary meaning of the terms is ambiguous or obscure, or when that ordinary meaning leads to a manifestly absurd or

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[16] See Vienna Convention on the Law of Treaties, concluded May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679 (1969). The United States has signed but not ratified the Vienna Convention, but even in this country it is "generally recognized as the authoritative guide to current treaty law and practices." See Letter of Submittal by the Secretary of State to the President, in S. Exec. Doc. L, 92d Cong., 1st Sess. at 1 (1971), also quoted in American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, pt. III, intro. note.

[17] See Vienna Convention on the Law of Treaties, art. 31 ("General rule of interpretation"). Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

unreasonable result.[18] Neither of these conditions pertains here, and thus there can be no justification for deviating from the clear meaning of the treaty language.

Even if Article 33(1) were to be rewritten according to the government's view of the negotiating history, this would simply permit the closing of the border to refugees. The affirmative action of returning refugees to a place where they face persecution would still contradict the dictates of Article 33(1).

2. Section 243(h) of the Immigration and Naturalization Act Incorporates the International Standard of Non-Refoulement Directly Into US Federal Law

International law has long been accepted as an important source for the interpretation of statutory and constitutional provisions, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (international legal principles inform congress' power of exclusion and deportation of aliens), and it has, from the earliest cases, been recognized and applied by United

[18] Id. Article 32, which provides that:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

States courts. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796).[19]

Thus, the courts have affirmed that federal statutes "ought never to be construed to violate the law of nations, if any other possible construction remains ..." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), quoting *Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804). This axiom is particularly compelling with regard to the Refugee Act in light of Congress' intent to conform United States immigration law to the requirements of the Protocol.

In *Cardoza-Fonseca*, this Court found support in the history and the plain language of the Refugee Act, for the principle that international law for the protection of refugees both inspired the Act and continues to play an important role in its interpretation. 480 U.S. at 437 ("If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees ...").[20] In particular, the I.N.A.

[19] See also Restatement (Second), §§ 102, 135; Comment j (customary international law has the same force and effect as treaties and international agreements, and thus like federal statutes is the "law of the land."); *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982) ("in an appropriate case, to ascertain what Congress has authorized, one must consider the treaties, agreements, and customary international law to which the United States subscribes, as well as to domestic law."); accord *Bowater S.S. v. Patterson*, 303 F.2d 369 (2d Cir.), cert. denied, 371 U.S. 860 (1962).

[20] See also, *Stevic*, 467 U.S. at 426-427 (Act adopted and expanded Protocol's definition of refugee and was intended to be construed in a manner consistent with it); S. Exec. rep. No. 96-256, 96th Cong., 1st Sess. 1979, (the new statute was to be evidence of "our national commitment to human rights and humanitarian concerns" which had not been reflected in the previous immigration Acts).

(which the Refugee Act amends) nows adopts the Convention's definition of "refugee," as well as its scheme of classifications and grants of protection for asylum and withholding of deportation, including the provisions of Article 33(1). *Id.* at 424, discussing *Stevic.*[21]

This Court found the *Handbook on Procedures and Criteria For Determining Refugee Status*, (Geneva 1979) (the "*Handbook*") to be a reliable source for interpreting the Act. *Cardoza-Fonseca*, 480 U.S. at 439 n. 22, (while not binding, the *Handbook* provides "significant guidance in construing the Protocol, to which Congress sought to conform."). The *Handbook* evolved from a request of the intergovernmental Executive Committee of the U.N. High Commissioner for Refugees ("UNHCR") -- on which the United States sits -- that the Office of the UNHCR publish a handbook for the guidance of governments as to their obligations under the Protocol. Exec. Com. Concl. No. 8 (XXVIII).[22]

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[21] Thus, the House Judiciary Committee Report stated that Congress sought "to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and [felt] it both necessary and desirable that United States domestic law include the asylum provision in the instant legislation..." *Stevic*, 467 U.S. 426 at n. 20.

[22] Article II(1) of the Protocol, like Article 35 of the Convention, places an obligation on States Parties to "cooperate" with the UNHCR and "facilitate its duty of supervising the application of the provisions of the present Protocol." Such cooperation and facilitation requires, at a minimum, that States Parties observe authoritative conclusions of the Executive Committee of the UNHCR and follow the guidelines and interpretations of the Handbook.

It is incontrovertible that the I.N.A. is to be interpreted in light of international legal obligations relating to the protection of refugees, and that actions of the United States must be consistent with this country's international legal obligations, whether they are taken within the territory of this country or beyond its territorial waters.[23]

3. The Principle of Non-Refoulement is a Universally Recognized Norm of Customary International Law Which All Countries are Bound to Apply Extraterritorially As Well As on Their Own Territory

The government asserts that Haitians outside the territory of the United States do not have a right to an asylum hearing under the laws of the United States, even when they are interdicted by ships under the jurisdiction of the United States. AI does not agree. These individuals have an inalienable right not to be sent back to Haiti in violation of the principle of *non-refoulement*; as recognized by both international law and the law of the United States. This right is in no way dependent upon their presence upon U.S.

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[23] In this regard the intergovernmental Executive Committee of the UNHCR has concluded that:
"In accordance with established international practice, supported by relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers rescued at sea. In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with principles of international solidarity and burden-sharing in granting resettlement opportunities. Executive Committee Conclusion No. 23(XXXII), "Protection of Asylum Seekers in Situations of Large-Scale Influx", 32nd Session, § II(2).

territory, because it is a universally applicable norm of general international law. The United States government has no more right to violate such a norm upon the high seas than it does upon its own territory. In this regard, it is worth noting that the intergovernmental Executive Committee of the UNHCR stated in 1981 that "In cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis."[24]

The special status of the principle of *non-refoulement* is indicated by the fact that Article 33 is one of only five articles of the Convention in respect of which no reservations are permitted.[25] As the International Court of Justice has recognized, when a multilateral treaty permits reservations as to certain articles and excludes the possibility of reservations as to others, it is evidence that these latter articles reflect or crystalize general rules of customary international law.[26]

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[24] Executive Committee Conclusion No. 22(XXXII), "Protection of Asylum Seekers in Situations of Large-Scale Influx", 32nd Session (1981), § II(2).

[25] See, Convention, Article 42; Protocol, Article VII. The latter provides in pertinent part that:
"At the time of accession, any State may make reservations in respect of Article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention, other than those contained in articles 1, 3, 4, 16(1) and 33 thereof..."

[26] *North Sea Continental Shelf Cases*, 1969 I.C.J. 4. The opinion in that case observes:
"general or customary law rules which by their very nature, must have equal force for all members of the internal community, and cannot therefore be the subject of any unilateral exclusion exercisable at will by any of them in its favor. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in

This suggests that the principle of *non-refoulement* has a legal status independent of the Convention and the Protocol.

Thus the principle of *non-refoulement* is more than just a conventional rule creating obligations for the United States and other countries.[27] It involves a fundamental right of asylum seekers; a right which like other parts of the international law of human rights, would be part of the law of the United States even had the United States had not ratified the Protocol. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

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certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"--these three articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary law ..." Id. at p. 42

[27] 107 States have ratified the Convention or the Protocol, thereby accepting the expression in Article 33(1) of the customary international norm of non-refoulement which has evolved into a principle limiting both the expulsion of refugees back to the country of origin and the rejection of refugees at a country's borders. As such, Article 33(1) is a norm-creating provision, of the type recognized by the International Court of Justice. *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 42. The widespread recognition of the binding nature of non-refoulement is further born out by its inclusion in other international instruments (see, e.g., Article 3(1) Declaration on Territorial Asylum, (Dec. 14, 1967) A/RES/2312(XXII)), and its crystallization (since the end of World War II) into a customary international norm, so that its peremptory nature is now undisputed. G. Goodwin-Gill, supra, at 297-98.

The principle had begun to achieve recognition as part of general international law even before the Convention was negotiated,[28] and it has subsequently been reaffirmed in a number of multilateral treaties and other instruments.[29] Some authorities have even argued that the principle of non-refoulement is a peremptory norm of international law, or *jus cogens*.[30] The Executive Committee of the High Commissioner's Programme, an authoritative body comprised of government representatives, and in which the United States participates, has expressed the view that "[p]ersons fleeing serious danger resulting from unsettled conditions of civil

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[28] See, Paul Weis, International Protection of Refugees, 48 Am. J. Int'l. L. 193, 198 (1954).

[29] See, American Convention on Human Rights, OAS Official Recs., OEA/ser. K/XVI/I.I doc. 65, rev. 1, corr. 2, art. 22(8), January 7, 1970; Declaration on Territorial Asylum of December 14, 1967, G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6716, art. 3(1) (1968); Convention on the Organization of African Unity, 8 I. L. M. 1288, 1292 (1969); Convention on the Status of Stateless Persons, Sept. 28, 1954, No. 5158, 118, 360 U.N.T.S. 122, Final Act of the Conference which adopted the Convention, at 122-124. See also Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment U.N.G.A. Res. 39/46, 39 GAOR Supp. (No. 51) 197, U.N. Doc. A/RES/39/46 (1984), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985); and Principle 5 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the United Nations Economic and Social Council (ECOSOC) in May 1989, E.S.C. res. 1989/65, U.N. Doc. E/1989/INF/7, at 129 (1989), endorsed by the UN General Assembly in G.A. res. 44/162 of Dec. 15, 1989.

[30] See, Refugee Refoulement: The Forced Return of Haitians Under the U.S. Haitian Interdiction Agreement, Lawyer's Committee for Human Rights, (March 1990), at 57.

strife are protected from forced repatriation by a customary norm which has achieved the status of *jus cogens*."[31]

Regardless of whether the principle has been generally accepted as a peremptory norm of international law (*jus cogens*), it is clear that it has been generally accepted as a binding rule of general international law, and as such it is part of the "law of the land" in the United States. *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

C. INTERNATIONAL LEGAL STANDARDS REQUIRE THAT EACH INDIVIDUAL ASYLUM APPLICANT BE GRANTED A HEARING ON THE MERITS OF HIS CLAIM BEFORE FORCIBLE REPATRIATION CAN OCCUR

Since the right of refugees to *non-refoulement* protection is assured both by the I.N.A. and the Protocol, the question of whether the May 24th Executive Order is contrary to law cannot be determined without reference to this country's international obligations under the Protocol. Under international law the merits of a claim for protection as a refugee may not be determined in the absence of fact-finding procedures adequate to protect this fundamental right. Thus, the new U.S. policy of returning Haitian refugees to Haiti without according them the opportunity for a hearing on their asylum claims is inconsistent with the United States' binding obligations under the Protocol, and the execution of that policy should therefore be enjoined.

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[31] 1985 Report of the United Nations High Commissioner for Refugees, paragraphs 22-23, U.N. Doc. E/1985/62 (1985).

This Court has found that the Article 33(1) treaty standard is the "counterpart" of § 243(h) of the I.N.A., and that both prohibit refoulement and impose a mandatory duty not to return an alien to a country where his life or freedom would be threatened on account of one of the enumerated reasons. *Cardoza-Fonseca*, 480 U.S. at 429, 441. This interpretation is consistent with the express legislative intent that § 243(h) is "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, at 20.

Neither the Convention nor the Protocol describe any specific procedures for determining claims for refugee status and *non-refoulement* protection. However, since the purpose and intent of the Protocol is the protection of refugees,[32] particularly through signatories' adherence to the non-reservable obligation of *non-refoulement*, it is axiomatic that the beneficiaries of protection -- the refugee(s) defined in Article 1 of the Convention -- must initially be identified.[33]

Consequently, a refusal or failure to undertake the task of identifying refugees through appropriate procedures constitutes a failure to implement the Convention and therefore the Protocol in good faith. Article 31(1) of the

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[32] Parties to the Convention have, in its Preamble, recognized "the social and humanitarian nature of the problem of refugees" and "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of [fundamental human rights]."

[33] The Handbook notes that "it is obvious that to enable States Parties to implement the provisions, refugees have to be identified." at 189.

Vienna Convention on the Law of Treaties[34] strongly supports this conclusion. "Good faith" implementation of treaty provisions means that states are obliged to give effective implementation to treaty norms. Some factual, evidentiary inquiry is necessarily required to evaluate the fears of asylum seekers as a predicate to making the required legal determination. Several appellate courts expressly require an asylum applicant to make a showing "by credible, direct, and specific evidence." *Alvarez-Flores*, 909 F.2d at 5, quoting *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986).[35]

While determining the precise form of procedures to be established is in principle left to the discretion of states, the intergovernmental Executive Committee of the UNHCR has set out the basic requirements for such procedures and in so doing, has clearly implied that a procedure is necessary and that it must conform to these basic requirements.[36] The delineation of international standards by which to judge such procedures clearly presupposes that the procedures exist and underscores the centrality of such procedures to the effective implementation of the non-refoulement norm.

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[34] U.N. Doc. A/conf. 39/27 (1969). Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

[35] See also M.A. v. INS, 899 F.2d 304, 311 (4th Cir 1990 ("To validate the 'well-foundedness' of his fear, [petitioner] must set forth specific, concrete facts"); *Cruz-Lopez v. INS*, 802 F.2d 1518, 1522 (4th Cir. 1986) ("specific facts" required for objective evaluation).

[36] Executive Committee Conclusion No. (XXVII) on the "Determination of Refugee Status." These procedures are also set forth in the UNHCR Handbook.

These principles have been recognized by U.S. officials. On May 30, 1989, Ambassador John Norton Moore, then U.S. Coordinator for Refugee Affairs, stated that:

"*As a party to the UN protocol* relating to the status of refugees, my government considers it essential that the principle of nonrefoulement set forth in Article 33 of the refugee convention be applied to refugees as defined in the convention. Whether a country chooses to apply the convention definition or the "expanded" Cartagena definition of refugee in its domestic asylum practice, *asylum seekers must be given a fair opportunity to make their case for refugee status. There must be procedures for status determination that ensure that persons with valid claims are not repatriated involuntarily.* "Developing Solutions for Central American Refugee Problems", Department of State Bulletin, August 1989, p. 87 (emphasis added).

As the District Court noted, "Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution."[37] The many individual asylum claims of Haitian asylum seekers interdicted at sea depend upon the resolution of issues that raise formidable questions of fact, and a fair resolution of these claims simply cannot occur without a hearing.

D. THE INTERDICTION POLICY VIOLATES THE RIGHT OF INDIVIDUAL HAITIANS TO SEEK ASYLUM, AS RECOGNIZED BY INTERNATIONAL LAW

"Everyone has the right to *seek* and to enjoy in other countries asylum from persecution." Article 14(1) of the Universal Declaration of Human Rights, December 10, 1948,

[37] Memorandum and Order of June 5, 1992, p. 6.

U.N.G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948), (emphasis added, adopted unanimously with eight abstentions). While United Nations General Assembly resolutions are not in and of themselves binding on member states, these states have "pledged" themselves to observe and promote human rights and basic freedoms both in the United Nations Charter; Charter of the United Nations, Articles 55 and 56, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945; and in the Universal Declaration. Universal Declaration, Preamble.[38] Provisions of the Universal Declaration have been cited as evidence of customary international law by a number of courts, including the International Court of Justice. *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Judgment, 1980 I.C.J. Reports 3, at 42, para. 91; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); *Golder* case, 57 I.L.R. 201, at 216-17 (1975).[39] Accordingly, the right of every person to seek asylum in another country, as expressed in the Universal Declaration is now part of customary international law, and is

[38] The obligation of all members to comply with the Universal Declaration was confirmed in two subsequent Declarations, also adopted unanimously. In Article 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, U.N.G.A. Res. 1515 (XV) of Dec. 14, 1960, 15 U.N. GAOR, Supp. (No.16) 66, U.N. Doc. A/4684 (1961); and in Article 11 of the Declaration on the Elimination of All Forms of Racial Discrimination, 15 U.N. GAOR, Sup. (No.15) 35-37, U.N. Doc. A/5515 (1964).

[39] See also, Nuclear Tests, (New Zealand v. France), Judgment of 20 December 1974, 1974 I.C.J. 457, 487-88 (Sep. Op. Petren): "It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights of all . . . an obligation under international law towards all States members of the international community."

thus also a part of the laws of the United States. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

Although Article 14(1) of the Universal Declaration does not provide for a right to be granted asylum, it does demand that individuals be accorded the right to flee their countries in search of asylum elsewhere. The interdiction program denies Haitians the opportunity to exercise this right, and is therefore inconsistent with the international obligations of the United States. To facilitate and enhance the efficacy of the government's program, United States Coast Guard cutters interdict refugee vessels in the Windward Passage, immediately off the Haitian coast.[40] Interdicting at a point so close to Haiti, and nearer to Cuba and to the Bahamas than it is to the territory of the United States, the Coast Guard cannot know the destination of the refugee vessels. Refugees who may be seeking asylum in nations other than the United States, such as the Bahamas, Jamaica, or Cuba, are denied that right by the cutters which force *all* refugee ships back to the Haitian shore.[41] The Second Circuit opinion

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[40] The Second Circuit noted in the opinion below that interdiction activities were taking place primarily in the windward passage. "According to the government, the Haitians are somehow violating the INA's prohibition on illegal entry while afloat on the international waters of the Windward Passage. This argument is perplexing at best, and in any event provides no ground for sustaining the current interdiction program." *McNary*, 969 F.2d 1367.

[41] Over the years Haitians fleeing their country have been emigrating not only to the United States but to other countries as well. A large number have made their way to the Bahamas. A 1985 article referred to "the 25,000 to 40,000 Haitians estimated to be living illegally in the Bahamas", most of whom originally escaped Haiti by way of the "windward passage". See Marshall Ingwerson, Crackdown on Haitian Illegals, The Christian Science Monitor, Dec. 26, 1985, at 1.

correctly observed that "when seized, these aliens were far from, and by no means-necessarily heading for, our gates." *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1366. The result is that the "government's actions prevent the Haitians from seeking asylum in *any* country." *Id.* at 1367 (emphasis by the court). By denying Haitian refugees their right to seek asylum, and forcibly returning them to Haiti in a manner which is inconsistent with the principle of *non-refoulement*, the United States violates its international obligations under customary international law. The courts should take these commitments into account in interpreting §243(h)(1) of the I.N.A.[42] and in ruling upon the legality of the interdiction program.

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[42] The interpretative rule that an act of Congress "ought never to be construed to violate the law of nations, if any other possible construction remains..." has been recognized by this court since 1804. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); all quoting Chief Justice Marshall in *Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804).

CONCLUSION

For all of the foregoing reasons this Court should affirm the judgment of the Court of Appeals.

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* Counsel recognize the contribution of Joanne Mariner, a recent graduate of Yale Law School, in the preparation of this brief.